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No. 92-178

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

BB ASSET MANAGEMENT, INC. dba BROWN BAG SOFTWARE,

PETITIONER

vs.

SYMANTEC CORPORATION AND JOHN L. FRIEND, AN INDIVIDUAL AND dba SOFTWORKS DEVELOPMENT,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF IN RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

Petitioner's Reply Brief discusses Respondent Symantec's Opposition Brief in terms of the questions presented by Brown Bag in its Petition. Symantec's Opposition Brief contains matters which appear irrelevant to this appeal and inappropriate in any event. These matters are not discussed in this Reply Brief. However, Brown Bag reserves the right to address them at a later time should it be considered appropriate.

QUESTION I.

IS A PARTY TO LITIGATION DEPRIVED OF ITS CONSTITUTIONAL RIGHT TO COUNSEL OF ITS CHOICE UNDER THE FIFTH AND SIXTH AMENDMENTS WHEN THE COURT DENIES THAT PARTY ACCESS TO THE CONFIDENTIAL DOCUMENTS UNDER A PROTECTIVE ORDER IN THE CASE SOLELY BECAUSE THAT PARTY'S TRIAL COUNSEL IS THAT PARTY'S IN-HOUSE GENERAL COUNSEL?

Petitioner's premise is that the issue of access to confidential information under a protective order should be determined strictly on the basis of counsel's qualifications and need for access rather than resting on arbitrary distinctions between employed and retained counsel.

WAS BROWN BAG'S TRIAL COUNSEL DENIED ACCESS SOLELY BECAUSE HE WAS BROWN BAG'S IN-HOUSE GENERAL COUNSEL?

On P. 18 of its Opposition Brief, Symantec challenges Question I as presented by Brown Bag. Brown Bag phrased its Question I in terms of Brown Bag's trial attorney having

been denied access to the confidential documents under a Protective Order solely because he was Brown Bag's in-house general counsel.

On P. 14 of its Petition, Brown Bag quoted from U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984) at P. 1469:

> The certified question (whether access may be granted to retained and denied to in-house counsel solely on a presumption that inadvertent disclosure by the latter is more likely) is answered in the negative, i.e., a denial of access sought by in-house counsel on the sole ground of their status as in-house counsel is error.

Thus, the U.S. Steel court has equated denial of access solely on a presumption that inadvertent disclosure by in-house counsel is more likely with denial of access solely on the ground of status as in-house counsel. The U.S. Steel court stated on P. 1468 that denial or grant of access cannot rest on a general assumption that one group of lawyers are more likely or less likely inadvertently to breach their oath under a protective order.

In the instant case, the Magistrate's Order (Petitioner's Appendix, P. c4) stated:

> Under the circumstances of this case in-house counsel is so close to the party that the dangers of inadvertent disclosure of information is impossible to control.

Apparently, the Magistrate's phrase, "Under the circumstances of this case," refers to the prior paragraph which generally states that in-house counsel's responsibilities run the gamut of legal issues and that in-house counsel's role is to advise management on all legal issues. Since these are merely the general functions of an in-house attorney, the Magistrate denied access solely on the basis that Brown Bag's attorney was more likely inadvertently to breach his duty under the existing Protective Order solely because he was in-house general counsel.

In U.S. Steel Corp. v. United States, 730 F.2d 1465, the court stated at P. 1467:

> The denial of access here rested on the court's stated general assumption that there is a "greater likelihood of inadvertent disclosure by lawyers who are employees committed to remain in the environment of a single company". Denial or grant of access, however, cannot rest on a general assumption that one group of lawyers are more likely or less likely inadvertently to breach their duty under a protective order. Indeed, it is common knowledge that some retained counsel enjoy long and intimate relationships and activities with one or more clients, activities on occasion including retained counsel's service on a corporate board of directors. Exchange of employees between a client and a retained law firm is not uncommon. Thus the factual circumstances surrounding each individual counsel's activities, association, and relationship with a party, whether counsel be in-house or retained, must govern my concern for inadvertent or accidental disclosure.

Brown Bag stated on P. 13 of its Petition that both Brown Bag's President and in-house general counsel had submitted declarations which stated that Brown Bag's in-house general counsel was not involved in product positioning. Brown Bag's President also stated in his declaration that he would ensure that no one at Brown Bag interfered in any way with the obligations imposed by the Protective Order on in-house counsel.

WHAT IS THE EFFECT OF THE MAGISTRATE'S AUTHORIZING BROWN BAG TO SEEK THE SERVICES OF AN INDEPENDENT CONSULTANT TO REVIEW AND ADVISE ON ISSUES INVOLVING THE CONFIDENTIAL DOCUMENTS?

On P. 18 of its Opposition Brief, Symantec points out that the Magistrate authorized Brown Bag to seek the services of an independent consultant to review and advise on issues involving the confidential documents. Brown Bag discussed this issue in its Petition on P. 15. Retention of a consultant was not a viable alternative. Trial counsel cannot effectively represent his client if shown only certain documents selected by a consultant after a costly and time-consuming proceeding. To make informed decisions regarding case management, counsel must evaluate personally all aspects of a case. Since Respondents' trial counsel had access to all of Brown Bag's confidential documents under the Protective Order, Brown Bag was at a great disadvantage without similar access.

SYMANTEC'S CASE AUTHORITY

Symantec relies on three cases. In its Opposition Brief at P. 21, Symantec states:

> Courts have frequently denied in-house counsel access to the confidential documents of a competitor. F.T.C. v. Exxon Corp., 636 F.2d 1336, 1350 (D.C. Cir. 1980); Akzo N.V. v. U.S. International Trade Commission, 808 F.2d 1471, 1483 (Fed. Cir. 1986); A. Hirsh, Inc. v. U.S., 657 F.Supp. 1297, 1304 (C.I.T. 1987).

Regarding the latter case, Symantec states in its Opposition Brief at P. 22:

> "[I]n a small corporation where insulation of one department from another is insignificant, if it exists at all, there remains a justified concern that disclosure to [in-house counsel] would place him in the unnatural and unremitting strain of having to exercise constant self-censorship in his normal working relations. A. Hirsh, 657 F.Supp. 1297, at 1304.

In order to place the foregoing in proper perspective, let's examine the circumstances. In A. Hirsh, 657 F.Supp. 1297, the court stated at P. 1299:

> David B. Hirsh, Esq. is general counsel and chief legal officer of the plaintiff A. Hirsh, Inc., a corporation that imports the paint brushes subject to the anti-dumping-duty order and that is owned and operated by Mr. Hirsh's father, Erwin Hirsh, who manages the firm along with David's brother. See Hirsh Affidavit, para. 5. From February 20, 1981 until July 28, 1986, David. Hirsh was empowered by plaintiff's board of

directors "to perform the duties and exercise the powers of the presidency in the absence or disability" of his father. (Footnote omitted.)

At P. 1303 and P. 1304, the Hirsh court stated:

> Although perhaps not directly "involved in the competitive decision-making of the company", Mr. Hirsh until recently was empowered with the authority to act as its president under certain limited circumstances, See Hirsh Affidavit, para. 6. He continues to serve as an officer of the plaintiff. See Plaintiff's Motion, p. 2; Hirsh Affidavit, para. 4. These facts, in addition to his familial ties to plaintiff's operating officers, suggest a lack of isolation of Mr. Hirsh from the commercial activities of the company, thus creating an "unacceptable opportunity for inadvertent disclosure." (Footnotes omitted.)

At P. 1305, the Hirsh court said:

> While access is necessary in order to prepare plaintiff's case, its need has already been satisfied by disclosure to its retained counsel, James A. Resti, Esq., under the December 1st protective order.

Further on P. 1305, the Hirsh court stated:

> In short, in view of retained counsel's competence, it is not clear how plaintiff's position will be prejudiced by excluding Mr. Hirsh from access to the nonpublic part of the agency record.

Thus, the Hirsh case is easily distinguished. Brown Bag's Petition, P. 9 and P. 10, refers to the declarations submitted by Brown Bag's in-house counsel and by Brown Bag's Presi-

dent. These declarations stated that in-house counsel was neither an officer nor a director of Brown Bag, played no management role in the product positioning of Brown Bag and, so far as was known, was not related to any other person at Brown Bag. Brown Bag's President further declared that he would ensure that no one at Brown Bag interfered in any way with the obligations imposed by the Protective Order on in-house counsel.

The Hirsh court gave great weight to the presence of outside counsel in the case. The Hirsh court stated at P. 1305 that it was not clear how plaintiff's position would be prejudiced by excluding Mr. Hirsh in view of retained counsel's competence. IN THE INSTANT CASE, BROWN BAG WAS GREATLY PREJUDICED SINCE THERE WAS NO OUTSIDE COUNSEL. In-house counsel was the counsel of choice of Brown Bag.

In Akzo N.V. v. U.S. International Trade Commission, 808 F.2d 1471 (Fed. Cir. 1986), the court said at P. 1483:

> However, "[i]n section 337 investigations, it is the exception rather than the rule to release confidential information to in-house counsel."
>
> The primary justification for the Commission's reluctance to grant adversary management and in-house counsel access to confidential business information is that, in order to discharge its statutory responsibilities within the strict statutory time limits, the Commission is heavily dependent on the voluntary submission of information. Disclosure of sensitive materials to an adversary would undoubtedly have a chilling effect

on the parties' willingness to provide the confidential information essential to the Commission's fact-finding process.

Both A. Hirsh, 657 F.Supp. 1297 and Akzo N.V., 808 F.2d 1471, are trade cases covered by special provisions enacted by Congress. Those provisions are discussed in Akzo N.V. 808 F.2d1471, at P. 1483, where the court acknowledged that a conservative position on the side of optimum shielding of business information is used in trade cases.

The third case relied on by Symantec is F.T.C. v. Exxon Corp., 636 F.2d 1336 (D.C. Cir. 1980). This also is a special circumstances case involving a Federal agency, the Federal Trade Commission. The following appears at P. 1336:

> Order prohibiting in-house and retained counsel for corporation from having attorney-client relationship with wholly-owned subsidiary during course of Federal Trade Commission administrative proceeding that might result in divestiture of subsidiary from corporation was proper exercise of inherent equitable power of district court where corporation had been ordered to hold separate subsidiary pending outcome of the administrative proceedings, in that even though corporation and its subsidiary shared common interest in obtaining approval of the acquisition of subsidiary, possibility existed that divestiture would be ordered, which possibility gave rise to a fundamental conflict between corporation and subsidiary, and thus it was essential that hold separate order be rigorously enforced, and prohibition order was necessary to fully effectuate the order.

Further, in F.T.C. v. Exxon Corp., 636 F.2d 1336, the court stated at P. 1350:

> This concern over the very close relationship between in-house and other personnel of the corporation is well-illustrated in this case. Exxon requested access for only two members of the Exxon legal department: Richard Keresey and Donald Farley. As noted by the FTC, at the time Exxon made this request, Mr. Keresey sat on the board of directors of Exxon Enterprises, Inc., which then held Exxon's ACS operations. The relationship of Mr. Farley to Exxon's drives operation has been disputed by the parties. In any event, the District Court was faced with a possibility that both men had been closely involved with matters concerning Exxon's entrance as a competitor in the drives market, and could continue to be so involved in the future. (Footnotes omitted.)

Again, in the instant case both Brown Bag's in-house counsel and Brown Bag's President submitted declarations stating that Brown Bag's in-house general counsel was neither an officer nor a director of Brown Bag. Petition, P. 10.

In F.T.C. v. Exxon Corp., the court stated at P. 1342:

> First, we emphasize that in the FTC proceeding challenging the acquisition of Reliance, Exxon's interests will be represented by counsel of Exxon's choice. Exxon had retained counsel for that proceeding. Moreover, as a result of the modification requested by Exxon and incorporated in the June 25 Order, that counsel has access to all information of the Drives Group that is necessary to defend the acquisition. Exxon admits in its brief that "[t]he only additional information that would come to counsel as a result of

there being an ordinary attorney-client relationship would be irrelevant or privileged information." Brief of Appellant, p.25. Exxon has not claimed that it is in any way prejudiced by its inability to secure such information. (Footnote omitted.)

Thus, as in all of the other cases cited by Symantec, there are both in-house and retained counsel. BROWN BAG IS A CASE OF FIRST IMPRESSION ON THE CONSTITUTIONAL RIGHT TO COUNSEL. Brown Bag's litigation counsel is its only counsel and is its in-house general counsel.

Symantec submitted a separate document titled "Respondent's Appendix" with its Opposition Brief. Respondent's Appendix contained the transcript of proceedings before the Magistrate concerning Symantec's motion to have Brown Bag's in-house general counsel/litigation counsel excluded from access to the confidential documents under the existing Protective Order which authorized access by counsel of record and did not differentiate between retained and employed counsel. The transcript quotes Brown Bag's in-house general counsel at P. 45:

All right. Finally, I'd just like to say, Your Honor, that I've heard some implications here almost to the effect that in house counsel are second class citizens, that eventually outside counsel have to be brought into a case and I'm not aware of any authority in that way. It's perfectly acceptable for in house counsel to involve themselves in litigation. In fact, its done in many companies. I don't want to be thought of as a temporary stop gap person who is only here for, until outside counsel can be brought in or until we're told to bring outside counsel in. It's a very small company,

very few employees, very low sales and this is the way that the case is going forward at this point with inside counsel and I don't want to speculate as to whether or not outside counsel might be brought in, in the future.

QUESTION I SUMMARY

Brown Bag is a case of first impression on the right to counsel issue. In all the cases cited by Petitioner and Respondent, there were both retained and employed counsel. In the instant case, Brown Bag's in-house general counsel is its litigation counsel. Thus, denying Brown Bag's counsel access to the confidential documents under the terms of the Protective Order is effectively denying Brown Bag the right to counsel of its choice. Brown Bag's counsel was denied access to the computer source code and to other information critical to the development of Brown Bag's case. For example, without GrandView's source code, Brown Bag's counsel could not compare it with that of PC-Outline. If the two codes appeared substantially similar Brown Bag could have proceeded under a direct source code copying theory under its Complaint.

Counsel for Symantec and Mr. Friend had access to all of Brown Bag's confidential documents. Brown Bag proceeded with the equivalent of one hand tied behind its back, and Respondents prevailed on summary judgment. Having a consultant decide which documents Brown Bag should request from the court would have been costly, time consuming and would not have placed the parties on an equal footing. Brown Bag's counsel might have eventually obtained access

to some of the less important documents, but Respondents had automatic access to all of Brown Bag's confidential documents early on without the costly and time consuming process outlined by the Magistrate. Without access to all of the confidential documents, Brown Bag's counsel could not properly evaluate, plan and manage the case. Litigation counsel is the case manager, not some consultant. Petitioner respectfully suggests that this Honorable Court rule that the issue of access be determined strictly on the basis of counsel's qualifications and need for access rather than relying on arbitrary distinctions between employed and retained counsel.

In the event that this Honorable Court should decide to place the parties on an equal footing by allowing Brown Bag's trial counsel access to the confidential documents under the Protective Order, Brown Bag respectfully requests that discovery be re-opened for a period of at least 90 days to permit Brown Bag to evaluate and use the information.

QUESTION II.

IN PERFORMING A COMPARISON OF TWO COMPUTER SOFTWARE PROGRAMS UNDER THE COPYRIGHT LAW TO DETERMINE IF THE TWO PROGRAMS ARE SUBSTANTIALLY SIMILAR:

A. SHOULD THE COURT COMPARE THE OVERALL "LOOK AND FEEL" OF THE TWO PROGRAMS OR MAY THE COURT MERELY COMPARE CERTAIN ELEMENTS OF THE TWO PROGRAMS?

B. SHOULD THE COURT RESOLVE THE IDEA/EXPRESSION DICHOTOMY BY APPLYING THE ABSTRACTIONS SCALE OF JUDGE LEARNED HAND?

C. SHOULD THE USE OF LAY AND EXPERT OPINION BE ALLOWABLE IN A SINGLE SUBSTANTIAL SIMILARITY INQUIRY?

Question II is a three-part question. Each part will be addressed in order.

A. SHOULD THE COURT COMPARE THE OVERALL "LOOK AND FEEL" OF THE TWO PROGRAMS OR MAY THE COURT MERELY COMPARE CERTAIN ELEMENTS OF THE TWO PROGRAMS?

Mr. Friend sold PC-Outline to Brown Bag by means of a written Purchase and Sale Agreement dated April 17, 1987. Petition, P. 4 and Opposition Brief, P. 8. Symantec states at P. 9 of its Opposition Brief:

> Also in 1987, Friend developed the outlining program which came to be known as "GrandView," and sold the marketing rights to that program to Symantec. (Docket Nos. 130, 121.) Immediately after their agreement was signed, Symantec and Friend began a protracted process of consultations over modifying the user interface of GrandView, specifically to ensure that GrandView's user interface would be more similar to that of Symantec's existing programs MORE and ThinkTank. (Footnote omitted.)

Mr. Friend stated that the program which he sold to Symantec, and which eventually was named GrandView, had

been titled PC-Outline 2. Petition P. 5 and Mr. Friend's Deposition of October 18, 1988, P. 110, Lines 7-8.

Thus, Symantec and Mr. Friend worked together to modify PC-Outline 2 to "...ensure that GrandView's user interface would be similar to that of Symantec's existing programs...". Did Symantec and Mr. Friend change enough items to get around Brown Bag's copyright or was the overall "look and feel" of the programs substantially similar?

The foregoing shows why it is important to compare the overall "look and feel" of the programs in addition to comparing individual elements after performing analytic dissection. Individual elements may be changed, but the overall "look and feel" may remain the same.

Symantec states "Brown Bag did not offer copies of the original programs so that they could be compared as wholes...". Opposition Brief, P. 24. Symantec further states on P. 24 of its Opposition Brief:

> Brown Bag neither asked the district court to engage in a comparison of the works as wholes nor provided the court with evidence from which anyone could conclude that the works in their entireties were substantially similar.

However, Symantec then goes on state on P. 25 that the court directed the parties "...to demonstrate the programs at issue at the summary judgment hearing and to provide the court with copies of the programs that could be examined in chambers." Thus, the district court had the programs before

it. Brown Bag, 12 USPQ2d 1991, 1992 (Petitioner's Appendix B) and Appeals Court Decision, P. 3739 (Petitioner's Appendix A). At 12 USPQ2d 1991, 1992, the district court stated:

> The Court is called upon to decide whether the "look and feel" of the screen displays in defendants' computer outlining program are substantially dissimilar from plaintiff's copyrighted program so as to justify a grant of summary judgment.

Thus, the district court had the programs before it and stated that it was called upon to decide whether the "look and feel" of the programs was dissimilar. Therefore, the issue of substantial similarity was before the court for its proper determination.

On P. 28 of its Opposition Brief, Symantec cites Cooling Systems & Flexibles v. Stuart Radiator, 777 F.2d 485, 493 (9th Cir. 1985) for the proposition that what is important is not whether there is substantial similarity in the total concept and feel of the works, but whether the very small amount of protectible expression in the accused work is substantially similar to the equivalent portions of the plaintiff's work.

However, Cooling Systems was a case involving catalogs. The Cooling Systems court stated on P. 491:

> Catalogs, by definition, are saturated with facts, numbers, and literal depictions of concrete objects. As we emphasized in an only slightly different context, copyright law considers factual works to be fundamentally different from more artistic works: "similar-

> ity of expression may have to amount to verbatim reproduction or very close paraphrasing before a factual work will be deemed infringed." (Citation omitted.)

Symantec also states at P. 25 of its Opposition Brief that the court concluded that the features "were either (1) different in the two programs, (2) expressly licensed to Friend, and/or (3) unprotectable under copyright."

Regarding the material which was licensed to Mr. Friend, the Purchase and Sale Agreement states at P. 6 and P. 7 that Mr. Friend was to receive no license to reproduce, adapt or distribute PC-Outline, or any right to utilize the "look and feel" of PC-Outline. Petition, P. 19 and Plaintiff's Opening Brief, Appeals Court, P. 3. Yet, the district court excluded this licensed material from its "look and feel" analysis. In Brown Bag, 12 USPQ2d 1991 (Petitioner's Appendix B), the district court stated at P. 1996:

> The Court finds that it is unnecessary to review the alleged similarities in the drawing of the menu bar, the use of highlighting bars and the use of a single line box around the menus because these features are covered in the license agreement between plaintiff and John L. Friend.

All of the licensed material should have been included in a "look and feel" analysis because of the controlling clause in the Purchase and Sale Agreement described above. Brown Bag's Supplemental Memorandum in Response to Additional Citations Requested by Order of Judges Sneed, Tang and Thompson at Hearing of February 14, 1991, P. 5 and oral

argument before Appeals Court. The district court's analytic dissection and entire "look and feel" analysis is not complete since the court did not include the licensed material.

Thus, the licensed material should be included in the analytic dissection.

On P. 24 of its Opposition Brief, Symantec claims that Brown Bag lacked evidence. Yet Symantec had objected to Brown Bag's evidence which either was not admitted or not discussed by the district court.

Mr. Ogg's declaration was not admitted. Brown Bag, Appeals Court Decision, P. 3733 (Petitioner's Appendix A). Mr. Ogg had not been designated as an expert witness for trial, but he did list his computer background and experience in his declaration. Would his declaration have been admissible if he were chosen at random off the street and had no computer knowledge or experience?

On P. 24 of its Opposition Brief, Symantec cites Litchfield v. Spielberg, 736 F.2d 1352 (9th Cir. 1984) for the proposition that lists of purported similarities are insufficient to demonstrate substantial similarity. The Litchfield court stated at P. 1357: "To constitute infringement of expression, the total concept and feel of the works must be substantially similar. Sid & Marty Krofft, 562 F.2d at 1164."

Mr. Schupper's declaration may not have been considered upon objection. Brown Bag, Appeals Court Decision, P. 3734 (Petitioner's Appendix A). Mr. Schupper's declaration contained various attachments. Attachment 7 was a review of

GrandView published in a legal newspaper. The article stated: "GrandView has the same "look and feel" as PC-Outline." Petition, P. 32 and P. 33.

B. SHOULD THE COURT RESOLVE THE IDEA/EXPRESSION DICHOTOMY BY APPLYING THE ABSTRACTIONS SCALE OF JUDGE LEARNED HAND?

Respondent Symantec did not address this issue in its Opposition Brief.

C. SHOULD THE USE OF LAY AND EXPERT OPINION BE ALLOWABLE IN A SINGLE SUBSTANTIAL SIMILARITY INQUIRY?

Respondent Symantec did not address this issue in its Opposition Brief.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: September 14, 1992

Respectfully submitted,

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